

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

LYNN R. HYMAS, an individual and SUSAN  
 HYMAS, an individual,

Plaintiffs,

v.

DEUTSCHE BANK NATIONAL TRUST  
 COMPANY, AS TRUSTEE FOR MORGAN  
 STANLEY CAPITAL I INC. TRUST 2006-  
 NC2, a New York corporation; QUALITY  
 LOAN SERVICE CORPORATION, a  
 California corporation; NEW CENTURY  
 MORTGAGE CORPORATION, a California  
 corporation; DOES I through X, individuals  
 and ROES I through X, corporations,  
 inclusive,

Defendants.

2:13-cv-1869-RCJ-GWF

**ORDER**

Currently before the Court is Defendant Deutsche Bank's Motion to Dismiss with  
 Prejudice Plaintiffs' Complaint (#6). The Court heard oral arguments on December 11, 2013.

**BACKGROUND**

**I. Foreclosure Facts<sup>1</sup>**

Plaintiffs Lynn R. Hymas and Susan Hymas (collectively "Plaintiffs") executed a note  
 secured by a deed of trust on a piece of property located at 3116 Floral Vista Avenue,  
 Henderson, Nevada, which was recorded in Clark County on November 1, 2005. (Deed of  
 Trust (#7-2) at 2, 4). The mortgage, dated October 26, 2005, was for \$270,000. (*Id.* at 3).

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<sup>1</sup> This Court takes judicial notice of these public records. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 The lender and beneficiary on the deed of trust was New Century Mortgage Corporation. (*Id.*  
2 at 2-3). The trustee on the deed of trust was National Title Co. (*Id.* at 3).

3 On November 28, 2011, Wells Fargo Bank, N.A. as attorney-in-fact for New Century  
4 Mortgage, recorded a corporate assignment of deed of trust which granted and conveyed the  
5 beneficial interest in the deed of trust to Deutsche Bank National Trust Company, as Trustee  
6 for Morgan Stanley Capital I Inc. Trust 2006-NC2. (Corporate Assignment of Deed of Trust  
7 (#7-3) at 2-3).

8 On June 29, 2012, Wells Fargo Bank, N.A., as servicer and attorney-in-fact for  
9 Deutsche Bank National Trust Company, as Trustee for Morgan Stanley Capital I Inc. Trust  
10 2006-NC2, recorded a substitution of trustee and replaced Quality Loan Service Corporation  
11 as the trustee for National Title Co. (Substitution of Trustee (#7-4) at 2-3).

12 On December 19, 2012, Quality Loan Service Corporation recorded a notice of breach  
13 and default and of election to cause sale of real property under deed of trust. (Notice of  
14 Default (#7-5) at 2, 4). The notice of default identified the breach of obligations as “[t]he  
15 installments of principal and interest which became due on 9/1/2010, and all subsequent  
16 installments of principal and interest through the date of this Notice” along with other amounts  
17 due. (*Id.* at 2).

18 On March 8, 2013, Quality Loan Service Corporation recorded a certificate from the  
19 State of Nevada Foreclosure Mediation Program which stated that the property was a “non-  
20 applicable property” and that the beneficiary could proceed with the foreclosure process.  
21 (Foreclosure Mediation Certificate (#7-6) at 2).

22 On August 26, 2013, Quality Loan Service Corporation recorded a notice of trustee’s  
23 sale scheduled for September 20, 2013. (Notice of Trustee’s Sale (#7-7) at 2-3).

## 24 **II. First Amended Complaint**

25 In October 2013, Defendant Deutsche Bank National Trust Company, as trustee for  
26 Morgan Stanley Capital I Inc. Trust 2006-NC2, filed a petition for removal based on diversity  
27 jurisdiction and attached a copy of the First Amended Complaint (“FAC”) filed in Clark County,  
28 Nevada. (Pet. for Removal (#1) at 1; FAC (#1-9) at 2). In the FAC, Plaintiffs sued Deutsche

1 Bank National Trust Company, as trustee for Morgan Stanley Capital I Inc. Trust 2006-NC2  
2 ("Deutsche Bank"), Quality Loan Service Corporation, and New Century Mortgage Corporation  
3 (collectively "Defendants"). (FAC (#1-9) at 2).

4 The FAC alleged the following facts. (*Id.* at 4). On April 2, 2007, New Century  
5 Mortgage Corporation ("New Century") filed for Chapter 11 bankruptcy. (*Id.*). During the  
6 course of the bankruptcy, New Century asserted that it only had an ownership interest in 2,000  
7 loans at the time it filed for bankruptcy. (*Id.*). On June 29, 2007, Ellington Capital Inc.  
8 purchased all 2,000 loans from the New Century bankruptcy estate. (*Id.*). On June 29, 2007,  
9 Carrington Mortgage purchased the remaining mortgage servicing rights from the New Century  
10 bankruptcy estate to loans it serviced. (*Id.*). As of June 29, 2007, New Century was  
11 completely divested of any ownership or mortgage servicing rights to any mortgage loan  
12 including Plaintiffs' loan as of that date. (*Id.* at 5). Pursuant to the bankruptcy court's order  
13 confirming New Century's reorganization plan, all of its mortgage assets were conveyed into  
14 the entity New Century Liquidating Trust effective July 15, 2008. (*Id.*). The bankruptcy court  
15 confirmed a second and final amended plan which confirmed that New Century's assets were  
16 conveyed into the trust effective July 15, 2008.<sup>2</sup> (*Id.*).

17 The FAC alleged the following. (*Id.*). Plaintiffs' loan became the property of the  
18 liquidating trust on July 15, 2008 and, thus, New Century retained no valid interest in the loan  
19 to assign it to Deutsche Bank in 2011. (*Id.*). Deutsche Bank was not the proper party in  
20 interest and did not have standing to foreclose on the property. (*Id.*). The assignment from  
21 New Century directly to Deutsche Bank violated numerous provisions of the pooling and  
22 servicing agreement ("PSA"). (*Id.* at 6). The PSA required that the mortgage loan be sold  
23 from the depositor to the trustee and not merely assigned. (*Id.*). Quality Loan Service  
24 Corporation and Deutsche Bank were improper parties to enforce Plaintiffs' mortgage under  
25 NRS § 107.080. (*Id.* at 7).

26 The FAC alleged four causes of action. (*Id.* at 8-10). In the first cause of action,

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28 <sup>2</sup> A copy of the U.S. Bankruptcy Court for the District of Delaware's order is located at  
Docket Entry #13-1. (See Bankruptcy Order (#13-1) at 2-53).

1 Plaintiffs sought temporary restraining order, preliminary injunction, and permanent injunction.  
2 (*Id.* at 8). In the second cause of action, Plaintiffs sought declaratory judgment. (*Id.*). In the  
3 third cause of action, Plaintiffs alleged fraud. (*Id.* at 9). Plaintiffs alleged that Defendants  
4 represented to Plaintiffs that they were the duly appointed and authorized parties entitled to  
5 conduct a non-judicial foreclosure pursuant to NRS § 107.080. (*Id.*). Plaintiffs alleged that  
6 “the representations made by the Defendants, and each of them, in regards to their position  
7 and authority to conduct a non-judicial foreclosure . . . were in fact false and misleading . . .  
8 in that the Defendants . . . did not hold a proper assignment of the deed of trust, nor did they  
9 hold the note as required to properly conduct a non-judicial foreclosure.” (*Id.*). In the fourth  
10 cause of action, Plaintiffs alleged violations of NRS § 107.080 because Defendants were not  
11 the proper parties to conduct the non-judicial foreclosure. (*Id.* at 10).

12 The pending motion now follows.

### 13 LEGAL STANDARD

14 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the  
15 court must accept as true all factual allegations in the complaint as well as all reasonable  
16 inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150  
17 n.2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the  
18 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the  
19 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)  
20 motion to dismiss. However, the court may consider documents attached to the complaint or  
21 referred to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First*  
22 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

23 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a  
24 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th  
25 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant  
26 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,  
27 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does  
28 not need detailed factual allegations; rather, it must plead “enough facts to state a claim to

1 relief that is plausible on its face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022  
 2 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,  
 3 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949,  
 4 173 L.Ed.2d 868 (2009) (stating that a “claim has facial plausibility when the plaintiff pleads  
 5 factual content that allows the court to draw the reasonable inference that the defendant is  
 6 liable for the misconduct alleged”). Even though a complaint does not need “detailed factual  
 7 allegations” to pass muster under 12(b)(6) consideration, the factual allegations “must be  
 8 enough to raise a right to relief above the speculative level . . . on the assumption that all the  
 9 allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127  
 10 S.Ct. at 1965. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the  
 11 elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949. “Nor  
 12 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
 13 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

#### 14 **DISCUSSION**

15 Defendant Deutsche Bank files a motion to dismiss the entire complaint with prejudice.  
 16 (Mot. to Dismiss (#6) at 1). Deutsche Bank argues that the first and second causes of action  
 17 should be dismissed because a permanent injunction would make the property untransferrable  
 18 and eliminate any ability by Defendants to enforce their secured interest. (*Id.* at 5).  
 19 Additionally, Deutsche Bank argues that declaratory relief is not an independent cause of  
 20 action. (*Id.* at 6). Deutsche Bank argues that all claims related to New Century’s bankruptcy  
 21 should be dismissed because these claims arise under Title 11 of the Bankruptcy Code and  
 22 need to be addressed by the Delaware bankruptcy court. (*Id.* at 6-7). Deutsche Bank asserts  
 23 that the third cause of action should be dismissed because Plaintiffs fail to plead fraud with  
 24 Federal Rule of Civil Procedure 9 particularity. (*Id.* at 11). Deutsche Bank contends that  
 25 Plaintiffs do not have standing to assert a violation of the PSA agreement or the assignment  
 26 to Deutsche Bank based on the closing date for a securitized trust. (*Id.* at 12). Deutsche Bank  
 27 argues that Plaintiffs lack standing to challenge the 2011 assignment because they are not a  
 28 party to the assignment. (*Id.* at 14). Deutsche Bank asserts that the fourth cause of action

1 should be dismissed because Plaintiffs failed to tender the amount due and owing on the note.  
2 (*Id.* at 17). Deutsche Bank argues that the notice of default substantially complies with NRS §  
3 107.080(2). (*Id.* at 19).

4 In response, Plaintiffs concede that their cause of action for injunctive relief may be  
5 treated as a remedy. (Opp'n to Mot. to Dismiss (#12) at 4). Plaintiffs argue that this Court has  
6 jurisdiction to afford declaratory relief under NRS § 30.040. (*Id.* at 4-5). Plaintiffs assert that  
7 Deutsche Bank's argument that this issue must be raised in bankruptcy court is without merit  
8 based on Nevada case law regarding the lack of standing to foreclose. (*Id.* at 8). Plaintiffs  
9 argue that its third cause of action complies with Rule 9. (*Id.*). Plaintiffs assert that they are  
10 not challenging violations of the PSA agreement but rather the validity of the assignment. (*Id.*).

11 In reply, Deutsche Bank argues that Wells Fargo as the attorney-in-fact for New  
12 Century had the authority to execute the assignment. (Reply to Mot. to Dismiss (#17) at 2).  
13 Deutsche Bank attaches a copy of the "Limited Power of Attorney" to the reply. (Power of  
14 Attorney (#17-1) at 2). Deutsche Bank asserts that the limited power of attorney anticipated  
15 New Century's liquidation, was executed prior to the date that New Century filed for  
16 Chapter 11 bankruptcy, and stated that Wells Fargo had the authority to execute assignments  
17 after the plan of liquidation. (*Id.* at 3).

18 According to the limited power of attorney, New Century Chief Executive Officer Holly  
19 Etlin executed the document on June 17, 2008 before a notary. (Limited Power of Attorney  
20 (#17-1) at 2). The document named Wells Fargo, N.A. the servicer of mortgages originated  
21 by New Century. (*Id.*). The document stated that:

22 This limited power of attorney has been executed this 17th day of June, 2008,  
23 and is effective as of June 17, 2008. The same shall continue in full force and  
24 effect until revoked in writing by the undersigned. The parties agree that this  
Power of Attorney is coupled with an interest in the Mortgages, such that it shall  
continue in full force and effect upon and after the dissolution of the Originator  
pursuant to its Plan of Liquidation.

25 (*Id.*).

26 Nevada law provides that a deed of trust is an instrument that may be used to "secure  
27 the performance of an obligation or the payment of any debt." NRS § 107.020(1). Upon  
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1 default, the beneficiary, the successor in interest of the beneficiary, or the trustee may  
2 foreclose on the property through a trustee's sale to satisfy the obligation. NRS  
3 § 107.080(2)(c). A nominee on a deed of trust has the authority, as an agent, to act on behalf  
4 of the holder of the promissory note and execute a substitution of trustees. *Gomez v.*  
5 *Countrywide Bank, FSB*, 2009 WL 3617650, \* 1 (D. Nev. 2009). As long as the note is in  
6 default and the foreclosing trustee is either the original trustee or has been substituted by the  
7 holder of the note or the holder's nominee, there is no defect in the Nevada foreclosure. *Id.*  
8 at \*2.

9 As an initial matter, the Court finds that it may not consider Deutsche Bank's copy of  
10 the limited power of attorney on this motion to dismiss. The Court finds that Deutsche Bank  
11 only discussed this document in its reply to the motion to dismiss and, thus, did not give  
12 Plaintiffs an opportunity to address this document. Moreover, the Court finds that the limited  
13 power of attorney is not subject to judicial notice<sup>3</sup> on a motion to dismiss because it is not a  
14 publicly recorded document.

15 In this case, the Court finds that Plaintiffs state a cause of action for statutorily defective  
16 foreclosure pursuant to NRS § 107.080. Based on the complaint and the judicially noticed  
17 facts, Plaintiff has sufficiently alleged that Wells Fargo Bank, N.A. as attorney-in-fact for New  
18 Century did not have the authority to execute an assignment of the deed of trust to Deutsche  
19 Bank in November 2011 because New Century had filed for bankruptcy and had reorganized  
20 into a new entity on July 15, 2008. The Court finds that Deutsche Bank may provide evidence  
21 on a motion for summary judgment that demonstrates why Wells Fargo N.A. had the authority  
22 to execute an assignment of the deed of trust on behalf of New Century after New Century's  
23 assets had been conveyed to a separate entity. Accordingly, Plaintiffs state a claim for their  
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25 <sup>3</sup> If adjudicative facts or matters of public record meet the requirements of Federal  
26 Rule of Evidence 201, a court may judicially notice them in deciding a motion to dismiss.  
27 *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003); see Fed.R.Evid. 201(b) (stating  
28 that a judicially noticed fact must be one not subject to reasonable dispute in that it is either  
(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate  
and ready determination by resort to sources whose accuracy cannot reasonably be  
questioned.).



1 fourth cause of action.

2 The Court dismisses the first and second causes of action because injunctive and  
3 declaratory relief are remedies rather than independent causes of action. See *In re Wal-Mart*  
4 *Wage & Hour Employment Practices Litig.*, 490 F.Supp.2d 1091, 1130 (D. Nev. 2007) (finding  
5 that injunctive relief is not an independent ground for relief but a remedy); *Contreras v. Master*  
6 *Fin., Inc.*, 3:10-cv-0477-LRH-VPC, 2011 WL 32513, \*4 (D. Nev. Jan. 4, 2011) (finding that  
7 claims for injunctive or declaratory relief are remedies that may be afforded to a party after he  
8 has sufficiently established and proven his claims; they are not a separate causes of action).

9 With respect to the third cause of action, the elements of fraud in Nevada are: (1) a  
10 false representation made by the defendant; (2) defendant's knowledge or belief that the  
11 representation is false (or insufficient basis for making the representation); (3) defendant's  
12 intention to induce the plaintiff to act or to refrain from acting in reliance upon the  
13 misrepresentation; (4) justifiable reliance upon the misrepresentation; and (5) damage to the  
14 plaintiff resulting from such reliance. *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev.  
15 1992). Pursuant to Fed. R. Civ. P. 9(b), a party alleging fraud "must state with particularity the  
16 circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). As such, the pleadings  
17 "must state precisely the time, place, and nature of the misleading statements,  
18 misrepresentations, and specific acts of fraud." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.  
19 1994).

20 The Court finds that Plaintiffs have sufficiently pled fraud under the third cause of  
21 action. Plaintiffs' fraud claim is based on the recorded corporate assignment of the deed of  
22 trust which purports to have New Century grant and convey the beneficial interest in the deed  
23 of trust to Deutsche Bank. Plaintiffs allege that New Century and Deutsche Bank knew that  
24 the assignment was false. As such, the Court finds that this cause of action survives the  
25 motion to dismiss. However, the Court notes that if Deutsche Bank establishes a valid  
26 assignment of the deed of trust on summary judgment then Plaintiffs fail to establish a claim  
27 for fraud.

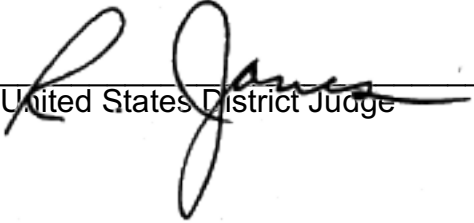
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**CONCLUSION**

For the foregoing reasons, IT IS ORDERED that Defendant Deutsche Bank's Motion to Dismiss with Prejudice Plaintiffs' Complaint (#6) is GRANTED in part and DENIED in part. The Court grants the motion to dismiss the first and second causes of action. The Court denies the motion to dismiss the third and fourth causes of action.

Dated this 16th day of December, 2013.

  
United States District Judge